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No. ____

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IN THE

Supreme Court of the United States

OCTOBER TERM 1984

WILLIAM J. SCOTT, on his own behalf and on behalf of all persons similarly situated,

Petitioner,

vs.

CITY OF HAMMOND, INDIANA; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; DOUGLAS M. COSTLE, Administrator of the United States Environmental Protection Agency; and the HAMMOND-MUNSTER SANITARY DISTRICT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Where, as here, subject matter jurisdiction is based on diversity of citizenship and the claim for relief is grounded in state law, does the Court of Appeals have the authority under the Tenth Amendment, the Rules of Decision Act, 28 U.S.C. Section 1654, and the decision of this Court in *Erie* v. *Tompkins* to fashion a federal common law choice of law rule to replace the choice of law of the forum state?

2. Where, as here, subject matter jurisdiction is based on diversity of citizenship and the claim for relief is based on state law, did the Court of Appeals err in holding that venue would lie only in the district where the defendant resides, in contravention of the venue statute governing diversity cases which allows venue to exist in the district where the plaintiff resides?

3. Is the state law tort claim preserved by the 1972 Federal Water Pollution Control Act Amendments, which the Court of Appeals held was available to plaintiff under Indiana law, a claim grounded in state law or federal law?

4. If the state tort law claim preserved by the 1972 Federal Water Pollution Control Act Amendments is grounded in federal law, does a federal district court then have federal question jurisdiction over the claim under 28 U.S.C. Section 1331?

5. If the state tort law claim preserved by the 1972 Federal Water Pollution Control Act Amendments is predicated on federal law, does a federal court in applying this "federal" claim have the authority to ignore or disregard either the choice of law or substantive law of the forum state in shaping a "uniform" "federal" common law of liability and relief predicated on federal law?

6. Is a holding that the state law claim preserved by the 1972 Federal Water Pollution Control Act Amendments is grounded in federal law really a holding that a federal common law of tort liability exists—a decision prohibited by this Court's decision in *Milwaukee II*?

7. If the federal court must apply the law of the State of Indiana, should the Court of Appeals have remanded to the district court to apply the choice of law rules of the State of Indiana to determine whether the complaint stated a claim upon which relief could be granted?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PARTIES INVOLVED

The judgment of the Court of Appeals involves several different cases which were consolidated either at the District Court or the Court of Appeals. The instant petition involves only case No. 80 C 4563, in the United States District Court for the Northern District of Illinois, *William J. Scott* v. *City of Hammond, Indiana, et al.*[1]

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[1] This case and *People of the State of Illinois, et al* v. *The Sanitary District of Hammond, et al.*, No. 80 C 4775 in the United

Footnote continued on following page.

This petition involves a diversity action brought by plaintiff and Petitioner William J. Scott, a citizen of Illinois against defendants and respondents the City of Hammond, Indiana and the Hammond-Munster Sanitary District, both municipal corporations and citizens of Indiana.[2]

PETITION

Petitioner William J. Scott prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on March 27, 1984, App. at D-1,[3] as modified by the Court of Appeal's order of May 29, 1984 denying rehearing, App. at B-1.

Footnote continued from preceding page.

States District Court for the Northern District of Illinois, were consolidated in a single appeal, No. 81-2236, before the Seventh Circuit.

In addition, the Seventh Circuit consolidated the "Hammond Cases" involved in No. 81-2236 for argument with *People of the State of Illinois, et al.* v. *Milwaukee,* appeal No. 77-2246 on remand from the Supreme Court of the United States.

The People of the State of Illinois have filed a separate Petition for a Writ of Certiorari from the judgment of the Seventh Circuit in Appeals Nos. 77-2246 and 81-2236.

[2] In a separate count of the Complaint, not involved in the decision of the Court of Appeals below or this Petition, Petitioner Scott sought relief from the United States Environmental Protection Agency and Douglas M. Costle, Administrator of the United States Environmental Protection Agency.

[3] Petitioner William J. Scott hereby adopts and incorporates as the Appendices to this Petition the Appendices to the Petition for a Writ of Certiorari filed by the Petitioners in *People of the State of Illinois et al.* v. *Milwaukee* and *People of the State of Illinois, et al.* v. *Sanitary District of Hammond, et al.* (Seventh Circuit Nos. 77-2246 and 81-2236).

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). The jurisdiction of the Court of Appeals was invoked under 28 U.S.C. Section 1292(b). The jurisdiction of the District Court over Petitioner Scott's state law claims was based on the diversity of citizenship statute, 28 U.S.C. Section 1332.

OPINIONS

The March 27, 1984 opinion of the Court of Appeals is not yet reported and is contained in the Illinois Appendices at A-1. The Seventh Circuit's order of May 29, 1984, denying Petitioner William J. Scott's petition for rehearing and modifying the March 27, 1984 opinion is also unreported and is included in the Illinois Appendices at B-1.

The opinion of the District Court in the Hammond case is reported as *Scott* v. *City of Hammond, Ind.*, 519 F.Supp. 292 (N.D. Ill. 1981), and is contained at F-1 of the Illinois Appendices.

CONSTITUTIONAL PROVISIONS INVOLVED

Article VI, Section 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATUTORY PROVISIONS INVOLVED

Relevant statute governing law to be applied:

The Rules of Decision Act, 28 U.S.C. Section 1652

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

Relevant statutes relating to subject matter jurisdiction:

Federal Question Subject Matter Jurisdiction, 28 U.S.C. Section 1331(a)

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

Diversity of Citizenship Subject Matter Jurisdiction, 28 U.S.C. Section 1332(a)

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States

Relevant statutes relating to Venue:

Venue based on diversity of citizenship jurisdiction, 28 U.S.C. Section 1391(a)

> A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose.

Venue based on federal question jurisdiction, 28 U.S.C. Section 1391(b)

A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.

Relevant Statutes or rules relating to *in personam* jurisdiction:

Rule 4(e) of the Federal Rules of Civil Procedure

* * *

Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state . . . service may . . . be made under the circumstances and in the manner prescribed in the statute or rule.

Illinois Statutes relevant to *in personam* jurisdiction:

Personal service outside state, Ill. Rev. Stat., ch. 110, Par. 2-208

Section 2-208. Personal service outside State. (a) Personal service of summons may be made upon any party outside the State. If upon a citizen or resident of this State or upon a person who has submitted to the jurisdiction of the courts of this State, it shall have the force and effect of personal service of summons within this State. . . .

Act submitting to jurisdiction—Process, Ill. Rev. Stat., ch. 110, Par. 2-209

Section 2-209. Act submitting to jurisdiction—Process. (a) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person . . . to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of such acts:

(2) The commission of a tortious act within this State.

Relevant provisions of the Federal Water Pollution Control Act:

F.W.P.C.A. Section 505(e), 33 U.S.C. Section 1365(e)

Statutory or common law rights not restricted

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek other relief (including relief against the Administrator or a State agency).

F.W.P.C.A. Section 510, 33 U.S.C. Section 1370

State authority

Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

STATEMENT OF THE CASE

In the summer of 1980, large clumps of fecal matter mixed with industrial grease began washing ashore on Chicago's beaches. These masses floated into the nearshore swimming areas of Chicago's beaches and actually washed onto the beach shore, contaminating the sand with a foul stinking mess.

This contamination of Chicago's Lake Michigan bathing waters and beaches continued for several weeks causing the virtual shutdown of the beaches in the hottest days of the summer. Earlier investigations of shoreline currents had established that contaminants are carried either South or North along Chicago's lakefront depending on the weather; and a detailed hunt for the source of the contamination revealed that Hammond, Indiana, was discharging raw human and industrial waste from a pumping station along the shore of Lake Michigan.

William J. Scott, a Chicago resident and Illinois citizen, brought suit against Hammond and its Sanitary District seeking damages and injunctive relief under Illinois tort common law. The suit was brought on Scott's personal behalf and as a class action on behalf of all other users of the contaminated beaches. Plaintiff sought damages of one million dollars for the weeks of beach closures.[4]

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[4] There are two other counts in Scott's complaint not directly relevant here. In Count II, Scott also claimed that the facts alleged entitled him to recover damages and injunctive relief under the federal common law of nuisance. That count was rendered moot by this Court's decision in *Milwaukee II*.

Scott's complaint also brought a claim (Count III) against the EPA Administrator for failure to establish water quality standards and water quality based effluent limitations to prevent the disgraceful raw sewage situation in Lake Michigan. That count is not involved in this Petition. The only way to prevent raw sewage discharges under the Clean Water Act is through water quality based effluent limitations established pursuant to Section 303(d). 42 U.S.C. Section 1313(d). The key mechanism for such Section 303(d) limits (called total maximum daily loads, "TMDLs") have not been prepared by the states more than 10 years after the statutory deadline. Scott cannot sue the State of Indiana for failure to meet its duty under the Clean Water Act as a result of this Court's decision in *Middlesex County Sewage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1982), that 42 U.S.C. Section 1983 is not available. Thus, 12 years after the passage of the Clean Water Act the discharge of raw sewage is permitted under the Act.

After Scott filed his complaint with his state law claims based on diversity of citizenship under 28 U.S.C. Section 1332, a subsequently filed state court suit by the State of Illinois and the Metropolitan Sanitary District of Chicago was removed by defendant Hammond from Illinois State Court to the federal District Court. The basis for removal was that the federal common law count provided federal question jurisdiction under 28 U.S.C. Section 1331.

After this Court's decision in *Milwaukee II*, Hammond moved to dismiss Scott's complaint for failure to state a claim upon which relief could be granted. The District Court denied the motion to dismiss and held that Scott had stated a claim upon which relief could be granted under state law.

Because of the importance of the question, the District Court certified its decision for interlocutory appeal pursuant to 28 U.S.C. Section 1292(b). App. at E-1. The Court of Appeals granted the motion for interlocutory appeal and consolidated the Hammond interlocutory appeal with the Milwaukee case.

On appeal, the Seventh Circuit reversed the District Court and held that in the Scott case—a diversity case based on state law—the *only* applicable law was Indiana law and not Illinois law.[5] The Court further indicated that the only venue for an action by Scott in a diversity case based on state law was in a federal district court or in a state court in Indiana where the defendant resided. The Court of Appeals refused to acknowledge that—even if Indiana law was applied—under the whole law of Indiana, the Indiana choice of law rules mandated application of Illinois law. Despite the request of Petitioner Scott to remand to the District Court to apply Indiana law—the choice of law dictated by the Court of Appeals—the Court of Appeals refused to remand. Instead, the Court of Appeals ordered dismissal of the case, thereby denying Petitioner Scott any remedy.

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[5] The decision of the Court of Appeals was by two judges: Judges Fairchild and Cudahy. Judge Sprecher, the third member of the panel, voted to affirm the district court, but died soon after oral argument without writing a dissenting opinion.

REASONS FOR GRANTING THE WRIT

In attempting to reconcile Congress' clear intent to preserve state tort law when it passed the Federal Water Pollution Control Act with the allegedly preemptive effects of a footnote in *Illinois* v. *City of Milwaukee ("Milwaukee I")*, 406 U.S. 91 (1972), the Court of Appeals has rewritten the Constitution and several statutes of the United States. To understand the constitutional dimensions of the Court of Appeals decision one must understand the operative facts of this case:

1. A citizen of one state engaged in tortious acts in one state which caused injury to a citizen of another state in another state.[6]

2. The injured citizen brought suit in the state of the injury seeking recovery under state tort law.

3. The suit was brought in the federal district court in the district where the injury occurred and was bought under the subject matter jurisdiction of diversity of citizenship. 28 U.S.C. Section 1332.

Given such facts, this should be a simple case. The Court of Appeals appeared to acknowledge that the tort law claim asserted by plaintiff Scott was grounded in state law, albeit the state tort law of Indiana. (App. B, at B-3, modifying footnote 2 of the Court of Appeals opinion).

Under *Erie* v. *Tompkins*, 304 U.S. 64 (1938); *Klaxon* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941); and *Day & Zimmermann, Inc.* v. *Challoner*, 423 U.S. 3 (1975), the federal

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[6] In this case the tortfeasor dumped fecal material into the water and the fecal material traveled into the victim's state. For analytical purposes, the fecal material could just as easily been a rock, a bullet, or poisonous fumes. Similarly, the path by which the injurious material traveled could just as easily been the air, the groundwater or along an interstate highway. See discussion *infra*.

courts are constitutionally mandated under the Tenth Amendment to apply the choice of law rules of the forum state. Applying the *Erie* framework to this case, the Court of Appeals was required to apply the choice of law rules of Illinois, because Illinois was the forum state. Illinois choice of law rules would have applied Illinois substantive tort law. *People ex rel. Scott* v. *United States Steel Corp.*, 40 Ill. App. 3d 607, 352 N.E.2d 225 (1st Dist. 1976); *Metropolitan Sanitary District* v. *United States Steel Corp.*, 30 Ill. App. 3d 360, 332 N.E.2d 426 (1st Dist. 1975), *leave to appeal den.*, 60 Ill. 2d 597, *cert. denied*, 424 U.S. 976 (1976). Even if Indiana had been the forum state, Indiana choice of law rules dictated the application of Illinois law as the law of the place of injury. *Maroon* v. *State Department of Mental Health*, 411 N.E.2d 404 (Ind. App. 1980).

But what should be a simple *Erie* diversity case has been rendered unnecessarily and extraordinarily complex by the Court of Appeals decision to engraft a series of federal common law principles onto this case.

1. *The Court of Appeals adopted a federal common law choice of law rule dictating choice of law of the tortfeasor state.* Contrary to *Erie* and *Klaxon*, the Court of Appeals, in a diversity case based on state tort law, mandated a federal choice of law dramatically different than that of the forum state. The Court of Appeals mandated the application of Indiana law in complete disregard of the choice of law rules of the forum state—Illinois. To compound matters further, the Court of Appeals mandated a federal choice of Indiana substantive tort law even though Indiana choice of law rules would dictate application of Illinois substantive tort law. In this diversity case based on state tort law, the Court of Appeals chose to ignore both the law of Illinois and the law of Indiana and fashion a federal choice of law rule.

2. *The Court of Appeals disregarded the federal venue statutes governing this case.* The Court of Appeals fashioned a federal common law venue rule that places venue of a state tort diversity action solely in the state or federal courts of the

tortfeasor's state. Such judicially mandated venue flies in the face of the diversity venue statute—28 U.S.C. Section 1391(a)—which allows such an action to be brought in the district court where the plaintiff resides. Indeed, even if this case is characterized as falling under Section 1391(b), Congress has declared that venue can exist in the district where the claim arose, i.e., Illinois, *Cf. Milwaukee* v. *Illinois* ("*Milwaukee II*"), 451 U.S. 304 (1981) (App. G at G-16 n.5).

3. *The Court of Appeals rewrote the law of in personam jurisdiction, disregarding the mandate of Rule 4 of the Federal Rules of Civil Procedure and the forum state long arm statute it incorporates.* Despite clear constitutional authority that such *in personam* jurisdiction exists, the Court of Appeals appears to have held that Illinois courts or federal courts in Illinois acting in a diversity case do not have *in personam* jurisdiction over an out-of-state tortfeasor who shoots a bullet, or throws a rock or dumps sewage into Illinois causing injury in Illinois. This Court has recently confirmed that such *in personam* jurisdiction exists. *Calder* v. *Jones*, ____ U.S. ____, 104 S.Ct. 1482 (1984) ("The fact that the actions causing the effects in California were performed outside the State did not prevent the State from asserting jurisdiction over a cause of action arising out of those effects." 104 S.Ct. at 1485-86).

4. *The Court of Appeals fashioned a federal common law of torts.* Rather than examining the substantive tort law of either Illinois or Indiana as to whether plaintiff Scott stated a claim upon which relief can be granted, the Court of Appeals fashioned a federal common law tort rule based on an incorporation of the Restatement (Second) of Torts and held that Scott failed to state a claim because he failed to allege special damages. (App. A, at pp. A24-A25). The District Court had found that plaintiff Scott did state a claim upon which relief can be granted under Illinois law. App. F at F-12 n.5). In its 1970 Constitution, Illinois had eliminated the special damage requirement for tort recovery. (*Id.*).

Each of the federal common law principles crafted by the Court of Appeals (choice of law, venue, *in personam* jurisdiction and substantive tort law) is unprecedented and violates the constitutional framework established for diversity cases grounded in state law. The Court of Appeals entire analysis is based on its inconsistent and contradictory attempts to divine and reconcile the obscure meaning of footnote law in *Milwaukee I* and *Milwaukee II* with the clear and manifest intent of Congress to leave claims for tortious injury to state law.

That Congress wished issues of tort remedies for water pollution injuries to be addressed by state law, and not federal law, is clear. The Court of Appeals purported to honor Congress' intent by declaring that the state law of the tortfeasor's state would be the law applied to redress tortious injury from water pollution. At the same time, the Court of Appeals read the footnotes of *Milwaukee I* to declare a constitutional prohibition against the application of state law. Further, the Court of Appeals never examined the mandate of the Tenth Amendment and *Erie* as applied to the state law choice of law made by the Court of Appeals.

The Court of Appeals' declaration that the law of the tortfeasor's state governs tort remedies in a diversity case based on state tort law creates bizarre constitutional anomalies. To address these anomalies, this Court must clarify and reconcile: a) the relationship of the intent of Congress to preserve state tort law; b) the nature of the continuing preemptive role, if any, of *Milwaukee I* on state law; and, c) the role of the Tenth Amendment and *Erie* as applied to this diversity case. The Court should grant certiorari.

I.

THE TENTH AMENDMENT AND ERIE V. TOMPKINS PROHIBIT THE FASHIONING OF FEDERAL COMMON LAW CHOICE OF LAW IN A DIVERSITY ACTION BASED ON STATE LAW

The Court of Appeals fashioned a federal choice of law to mandate application of Indiana state tort law to this diversity

case without analyzing the requirements of the Tenth Amendment and *Erie*. If the Indiana state tort remedy which the Court of Appeals found to be preserved by Congress is grounded in state law, then *Erie* and its progeny prohibit the action of the Court of Appeals.[7]

To place the *Erie* analysis in constitutional perspective, it is necessary to review: a) the historical state choice of law rules followed for identifying the law to be applied to interstate torts; b) the declared intent of Congress to preserve state tort law; and, c) the Tenth Amendment mandate of *Erie* and its progeny.

A.

The Historical Framework Governing Determination of Tort Liability When the Tortious Conduct Occurs in One State and the Injury Occurs in Another State

To appreciate how the Constitution—particularly the Tenth Amendment—affects the choice of which law applies in this case, it is useful to explore the well-developed body of law followed for over one hundred years by the states, including Illinois and Indiana, regarding the law to be applied in interstate torts.

Two distinct principles arise from this body of law. First, under the Tenth Amendment, absent action by Congress to oust state tort law, it has been *state* tort law, not federal tort law, which determines whether there is tort liability. This principle has long been the rule regardless of whether the tortfeasor or tort victim are citizens of different states, regardless of whether the tortious conduct was initiated in one state and caused injury

[7] As discussed *infra*, there are other serious constitutional problems if the state law preserved by Congress in the passage of the 1972 amendments is not state law, but federal law selectively incorporating state law.

in another state, and regardless of whether it is the law of the tortfeasor's state or the law of the place of injury which has been applied.

Second, the vast majority of states have recognized in their choice of law rules the right of the state of injury to apply its law. See e.g., *Ruckman* v. *Green,* 16 N.Y.S.C. Rep. (9 Hun) 225 (1876):

> The cause of action arises upon the injury suffered by the complaining party, and so in respect to the lands situated in this state, the cause of action necessarily arose here, although the nuisance which produced the injury was situated in another State. There is no sound principle, we think, which precludes a party whose property is specially injured by a nuisance which casts upon it offensive and noxious vapors because of the interposition of a state line between the nuisance and the property so injured; . . .
> Id. at 229.

See also, Thayer v. *Brooks,* 17 Ohio 489, 49 Am. Dec. 474 (1848); *Cameron* v. *Vandegriff,* 53 Ark. 381, 13 S.W. 1092 (1890); Cf. *Simpson* v. *State,* 92 Ga. 41, 17 S.E. 984 (1893). This choice of law rule has been applied in Illinois, *People ex. rel. Scott* v. *United States Steel Corp.,* 40 Ill. App. 3d 607, 352 N.E.2d 225 (1st Dist. 1976); *Metropolitan Sanitary District* v. *United States Steel Corp.,* 30 Ill. App. 3d 360, 332 N.E.2d 426 (1st Dist. 1975) *leave to appeal den.,* 60 Ill.2d 597, *cert. denied,* 424 U.S. 976 (1976); and also in Indiana, *Maroon* v. *State Department of Mental Health,* 411 N.E.2d 404 (Ind. App. 1980).

These state choice of law principles allowing the state of the injury to apply its law were reflected in the first *Restatement of Conflicts of Laws,* (1934). Under the first Restatement[8], the

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[8] Contrary to their use by the Court of Appeals, the Restatements of the American Law Institute on various legal subjects do not constitute sources of law which may be applied by federal courts under the authority of the American Law Institute. The federal courts may only apply law for which the courts find its authority in the

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law of the state of the wrong—i.e., the place where the injury occurred—determined whether there was tort liability. Consider the following examples from the first Restatement:

> 1. A, standing in State X, fires a gun and lodges a bullet in the body of B who is standing in State Y. The place of the wrong is in Y.
>
> * * *
>
> 4. A, in State X, throws out noxious fumes from a chimney which destroys the grass of B in State Y. The place of the wrong is in Y.
>
> Restatement of Conflict of Laws, Section 377, Illustrations 1 and 4 (1934)[9]

The Restatement (Second) of Conflicts of Laws, while shifting toward the significant contacts analysis of Section 145 as the test to be applied in choosing the law to be applied, also recognizes that the law of the state of injury is normally the law that governs in determining tort liability where the tortfeasor is in another state. See generally, Restatement (Second) of Conflicts of Laws, Sections 146, 156-163.

Indeed, Indiana still follows the place of injury doctrine and would apply Illinois tort law to determine the liability of an Indiana tortfeasor for injury caused in Illinois. See *Maroon* v. *State Department of Mental Health,* 411 N.E.2d 404 (Ind. App. 1980).

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Constitution, Acts of Congress or the laws of the states. In meeting its constitutional duty to apply state law under the Tenth Amendment and *Erie* in diversity cases, the federal courts must look to the state choice of law of the forum state—not the general pronouncements of the Restatement.

[9] Contrary to the Court of Appeals' attempt to distinguish these cases, they not only involve property damage, but also involve personal injury. Compare the Restatement examples noted above with the Court of Appeals' statements that these cases were limited to property damage. App. A, at pp. A-17 to A-18, n.3.

There the Indiana courts applied Illinois substantive tort law directly against the State of Indiana where then tortious acts of state officials (release of a sexual psychopath) occurred in Indiana, but the injury (murder of an Illinois resident by the psychopath) occurred in Illinois.

Thus, at least a hundred years of well-established law governs the application of state law where the tortfeasor and his tortious conduct are in one state and the victim and the injury are in another.

B.

The Intent of Congress to Preserve State Law

There can be no question that Congress wanted to preserve state tort law and state choice of law rules governing state tort law with the passage of the Federal Water Pollution Control Act:

> It should be noted, however, that the section would specifically preserve any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. Compliance with requirements under this Act would not be a defense to a common law action for damages.
>
> 2 Congressional Research Service, *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 93rd Cong. 1st Sess. 1499 (1973).

The House Committee on Public Works echoed similar sentiments:

> The Committee considers section 510 [33 U.S.C. Section 1370] to be of extreme importance in assuring the States of the right to adopt or enforce provisions at least as strict as those established in this legislation. Thus, *the Committee rejected in most instances suggestions for preemption by the*

Federal government and preempted the States only where the situation warranted it based upon the urgent need for uniformity such as in section 312(f) relating to marine sanitation devices.

1 Congressional Research Service, *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 93rd Cong. 1st Sess. 823 (1973).

Indeed, the legislative history of the predecessor of Section 510(2), Section 1(b) of the 1956 federal water pollution legislation—from which the current Section 510(2) was lifted *in haec verba*—demonstrates that Congress intended to preserve state tort law to cover just the kind of situation involved here. Consider the following colloquy between Senator Robert Kerr, Assistant Secretary of the Department of Health Education and Welfare, Roswell Perkins and Sidney Saperstein of the Office of General Counsel of HEW:

Senator KERR. What would be the effect of this law [the federal law] against the United States Steel Co.—let's say against Monsanto Chemical Co., at St. Louis—from whose plant obnoxious sewage and materials were permitted to get into the Mississippi River, and somebody with a farm at Cairo, Illinois would have some overflow and his land would be ruined by chemical substances in that overflow which he identified as either being Monsanto Chemical Co. products or similar in character to it. Would he then, under the provisions of this act, have a basis for suit for damages against the chemical company in St. Louis?

Mr. PERKINS. There would be no change—

Senator KERR. I did not ask that.

Mr. SAPERSTEIN. Senator, just as under existing law, this act does not give the private party a basis for another cause of action against another private party. This law merely authorizes the Federal Government to step in when the interests—health or welfare—of the citizens of one state are adversely affected by the pollution originative of another state.

It does not give those private parties which are adversely affected the right to come into court and sue. They would have to do that under the *common law or statutes now in existence.*

> Senator KERR. They have that right under the law now?
>
> Mr. SAPERSTEIN. Yes sir.
>
> Proposed Amendments to the Water Pollution Control Act: Hearings on S.890 and S.928 Before a Subcomm. of the Senate Comm. on Public Works, 85th Cong., 1st Sess. 48 (April 22, 1955). (emphasis added)

This colloquy, when considered in conjunction with the clear statements in the legislative history of the 1972 amendments, is strong evidence that Congress wished to have the issue of tort liability addressed under state law.[10]

There is absolutely no evidence that Congress wished to destroy either state tort law or the state choice of law rules which had regulated which state's tort law should be applied. Nor is there any evidence that Congress wished to override the Tenth Amendment mandate of *Erie,* that in matters relegated to state law, neither Congress nor the federal courts had any business adopting federal rules to govern state law actions. In other words, Congress may oust state law remedies, but once Congress has chosen to preserve such state law remedies, Congress cannot constitutionally dictate the content of those state remedies. See discussion of *Erie, below.*

C.

The Tenth Amendment Mandate of *Erie*

In *Erie* and its progeny, this Court has repeatedly held that where, as here the tort law under which relief is sought is grounded in state law; and where, as here, the basis of federal subject matter jurisdiction is diversity of citizenship, the federal

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[10] Indeed the legislative history demonstrating intent to preserve state tort remedies here under the FWPCA is clearer and broader than that found by this Court to preserve state tort remedies in *Silkwood* v. *Kerr-McGee Corp.*, ____ U.S. ____, 104 S.Ct. 615 (1984).

courts are constitutionally precluded from ignoring state law—including state choice of law rules—and from applying *ad hoc* federal common law rules as to substantive law and choice of law.

> There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.
>
> *Erie* v. *Tompkins,* 304 U.S. at 78.

The Tenth Amendment prohibition announced in *Erie* against federal courts fashioning substantive federal law in enforcing claims based on state law was applied to choice of law questions as well as in *Klaxon:*

> It is not for the federal courts to thwart such local policies by enforcing an independent 'general law' of conflict of laws . . . the proper function of the . . . federal court is to ascertain what the state law is not what it ought to be.
>
> 313 U.S. at 496-497.

Indeed where as here the state tort remedy which the Court of Appeals acknowledged to be available to plaintiff is grounded in state law, *Erie* indicated that even Congress would be prohibited by the Tenth Amendment from dictating the content of state tort law and choice of law rules. *Erie,* 304 U.S. at 78. Clearly the choice of law rules of the forum state should be applied in this case.[11]

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[11] Even assuming *arguendo* that the Seventh Circuit correctly concluded that Indiana law governs this case and not Illinois law, the Court of Appeal's judgment was wrong. Rather than reverse with instructions to dismiss and deprive Petitioner Scott of any remedy, the Court should have remanded with instructions to apply Indiana law to the factual allegations of Scott's complaint. See, e.g., *Krauss* v. *Manhattan Life Insurance Company of New York,* 643 F.2d 98 (2d Cir. 1981); *Boatland, Inc.* v. *Brunswick Corp.,* 558 F.2d 818 (6th Cir. 1977); *Liew* v. *Official Receiver and Liquidator (Hong Kong),* 685 F.2d 1192 (9th Cir. 1982); *Lettieri* v. *Equitable Life Assur. Soc. of the United States,* 627 F.2d 930 (9th Cir. 1980); *Melville* v. *American Home Assur. Co.,* 584 F.2d 1306 (3rd Cir. 1978).

II.

THE COURT OF APPEALS DECISION RAISES CONSTITUTIONAL ANOMALIES WHICH IF ALLOWED TO STAND WILL VIOLATE ERIE, THE EXPRESS INTENT OF CONGRESS TO PRESERVE STATE LAW, AND THIS COURT'S HOLDING IN MILWAUKEE II

The Court of Appeals' decision to fashion a federal choice of law mandating application of the tortfeasor's state law stems from its tortured attempts to divine and reconcile the footnote law of *Milwaukee I* and *Milwaukee II* with the clear intent of the Congress to preserve state law and the constitutional mandates of *Erie* (the Tenth Amendment). But the analysis of the Court of Appeals creates such constitutional anomalies that it cannot withstand rational analysis. If allowed to stand, the decision below will violate *Erie;* and the only constitutional theory on which it can stand also violates the express allocation of power between the federal and state governments by Congress in the 1972 amendments and violates the holding of *Milwaukee II* that federal common law in this area no longer exists.

A.

The Conflict Between the Court of Appeals' Milwaukee I Analysis and Congressional Intent to Preserve State Law

Consider the following logical dilemmas created by the Court of Appeal's decision:

1. *Indiana law cannot apply under the Court of Appeals' Milwaukee I analysis.* If footnote 6 of *Milwaukee I* (App. S at S-13) is really a declaration that the Constitution bars the application of state law to a diversity action between citizens of two states seeking redress for tortious injury,[12] then the Court of

[12] Contrary to the Court of Appeals' perception of *Milwaukee I,* there is nothing in the Constitution that prohibits the application of

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Appeals erred in applying Indiana tort law to this controversy. If the Constitution bars state law, it bars Indiana law as well as Illinois law.

2. *The Court of Appeals' Milwaukee I analysis overrides Congressional power to declare that state law shall govern.* If footnote 6 of *Milwaukee I* (App. S at S-13) is a declaration that the Constitution prohibits the application of state law, then Congress has no power to declare that state law shall govern tortious injury. If footnote 6 is held to have such permanent preemptive effect, this Court's *Milwaukee I* decision will destroy the allocation of federal and state power made by Congress in the 1972 legislation.

3. *The Court of Appeals' Milwaukee I analysis unconstitutionally discriminates against Illinois citizens.* If footnote 6 of *Milwaukee I* (App. S at S-13) is a declaration that plaintiff Scott, an Illinois citizen, is barred from seeking relief under Indiana state tort law in Indiana courts for a tortious injury when an Indiana citizen can seek relief under Indiana tort law for the same tortious conduct, then there is a conflict between footnote 6 and the Privileges and Immunities Clause,[13] as well as the equal protection guarantees embodied in the Fifth and Fourteenth Amendments. Cf. *Bolling* v. *Sharpe,* 347 U.S. 497 (1954).

4. *The Court of Appeals' analysis creates federal common law and violates Milwaukee II.* If the Court of Appeals is

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state law in a dispute between citizens of different states. Indeed, as discussed *supra,* the Tenth Amendment as construed in *Erie* dictates the application of state law. Moreover, over one hundred years of state choice of law decisions have held that the transmission of injurious material across state lines—be it fumes or fecal matter, rocks or bullets—raises questions of state law addressed by state choice of law doctrines.

[13] "The Citizens of each State shall be entitled to all the Privileges and Immunities of Citizens in the several States." U.S. Constitution, art. IV, sec. 2, cl. 1.

correct and footnote 6 of *Milwaukee I* (App. S at S-13) is declarative of a permanent constitutional preemption of state law which neither the courts nor the Congress can override, then this Court has unwittingly ushered in an era of federal "interstitial" common law of enormous breadth and uncertainty. Since under footnote 6 of *Milwaukee I* the Constitution bars state law, the state law of the tortfeasor must necessarily be grounded in federal law, i.e., the Clean Water Act. Indeed the only way the Court of Appeals' construction of *Milwaukee I* and its choice of Indiana substantive law can be reconciled with *Erie* is to hold that the "state" law preserved by Congress to address tortious injury is really federal law selectively incorporating the law of the tortfeasor's state. Compare *Erie* and its progeny with *Del Costello* v. *IBT*, ____ U.S. ____, 103 S.Ct. 2281, 2287, n.13 (1983); *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 1979); *Rodrigue* v. *Aetna Casualty and Surety Company*, 395 U.S. 352 (1969); *International Union, U.A.A. & A.I.W.* v. *Hoosier Cardinal Corporation*, 383 U.S. 696 (1966). Thus, in this case, the "Indiana" "state" tort law which the Court of Appeals found to be applicable would in reality be federal law which selectively incorporates the tort law of the tortfeasor state.

B.

The Conflict Between the Court of Appeals' Analysis and Milwaukee II

Such a construction—that the state tort law preserved by Congress is really federal interstitial common law of torts, with selected incorporation of state law—though superficially addressing some of the constitutional conundrums created by the Court of Appeals, creates even more constitutional problems:

1. *Congress clearly did not intend federal law to govern tort remedies.* A declaration that the "state" tort law preserved by Congress is really interstitial federal common law selectively

incorporating state tort law principles is clearly contrary to the intent of Congress' allocation of federal and state power. When Congress went out of its way to preserve other statutory and common law remedies under state law, Congress certainly did not contemplate "federal" tort law selectively incorporating state law.

2. *Milwaukee II held that there was no federal common law in this area.* A declaration that the "state" tort law preserved by Congress is really interstitial federal common law selectively incorporating state tort law principles is inconsistent with this Court's holding in *Milwaukee II* that all federal common law of tort liability had been ousted by the statutory framework adopted by the Congress in 1972—which allocated tort remedies to state law.

3. *The recognition of interstitial federal tort law would create tremendous lawmaking burdens on the federal courts.* Any such congressionally created federal law of tort liability selectively incorporating state law would ultimately be governed by federal, not state law principles. Thus, questions of statutes of limitation, contribution, indemnity, third party liability, joint and several liability and choice of law would all have to be resolved by federal courts fashioning what is essentially interstitial federal common law to flesh out Congressional intent. While state law would be available, the federal courts would be burdened with the task of shaping selective state doctrines to fit federal goals. (See, e.g. *Del Costello* v. *IBT*, ____ U.S. ____, 103 S.Ct. 2281 (1983), and other cases cited at p. 22 *supra*).

4. *Federal interstitial tort law would confer federal question subject matter jurisdiction in the federal courts.* Such a theory would create new subject matter jurisdiction for the federal courts. If state tort law really has its basis in the federal statute, then there is no reason why a citizen of Illinois cannot sue another Illinois citizen in federal court under federal question jurisdiction for the federal/state tort of polluting Lake Michi-

gan and seek damages and injunctive relief in federal court. Similarly, there is no reason under such a theory why an Indiana resident could not sue Hammond under this federal/state common law tort in federal court for damages and injunctive relief under Section 1331 jurisdiction. Surely, if the state law claim really has its source of power in the act of Congress rather than in the power of the State of Indiana, the case arises under the laws of the United States, and thus within the federal question jurisdiction of the federal courts.

5. *Such federalized "state" tort law would conflict with true state tort law.* Any such congressionally created federal law of tort liability selectively incorporating state law would create major potential for conflict with parallel state law remedies. For example, what would be the law applied under the Court of Appeal's theory in two parallel suits under Indiana law—one brought by an injured Indiana plaintiff and the other by the injured Illinois plaintiff? Under the Indiana plaintiff's suit, presumedly Indiana's actual state law would apply while under the Illinois plaintiff's suit, the court would apply the federal statutory interstitial tort law selectively applying state law.

Potential conflicts would arise when federal courts developed interstitial federal common law doctrines of statutes of limitations, comparative negligence, strict liability, third party liability, assumption of risk, contributory negligence, special damage standing, and similar issues which are attendant to all tort litigation.

6. *The Court of Appeals created a federal common law of venue and in personam jurisdiction.* Even if the Congress has authorized the federalized state law of the tortfeasor—and thus a federal question cause of action under Section 1331, the question remains whether the Court of Appeals can disregard the venue statute passed by Congress governing actions not based on diversity and the Federal Rules of Civil Procedure governing the exercise of in personam jurisdiction. As noted

above, venue is proper in the Northern District of Illinois, and that court has *in personam* jurisdiction over Defendants in this case.

C.

Adoption of a Federal Interstitial Common Law of Tort Law Selectively Incorporating State Tort Law Principles in This Case Will Apply with Equal Force to Similar Statutory Schemes

The precedent set by the Court of Appeals' decision will have far ranging and negative implications. In numerous statutes, Congress has affirmatively preserved state statutory and common law tort remedies on the understanding that the state tort law remedies preserved would be grounded in state law and not some federalized interstitial tort law based upon the regulatory statute. Thus Congress has preserved state law tort remedies for manufacture and distribution of hazardous or injurious products even though those same products may be regulated by a federal consumer product safety standard under a comprehensive program for regulating product safety.[14] In air pollution, the federal government has engaged in a comprehensive program to regulate air, 42 U.S.C. Section 7401 *et seq.*, but has explicitly preserved state tort remedies for air pollution.[15] In addressing toxic wastes, Congress has adopted a comprehensive "cradle to grave" regulatory program under the Resource Conservation and Recovery Act, 42 U.S.C. Sections 6901, *et seq.*, but has taken pains to preserve common law and statutory remedies under state tort law.[16] In each of these

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[14] Consumer Product Safety Act, 15 U.S.C. Section 2051, *et seq.* The provision preserving state tort remedies is 15 U.S.C. Section 2074.

[15] 42 U.S.C. Sections 7416 and 7604(e). In air pollution, this Court declared a federal common law remedy on the same day as *Milwaukee I. Washington* v. *General Motors Corporation,* 406 U.S. 109 (1972).

[16] 42 U.S.C. Sections 6929 and 6972(f). Indeed, under RCRA, generators in one state often transport hazardous or toxic wastes by

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instances, tortious conduct may originate in the state of the tortfeasor and produce injury in the state of the victim.[17]

If the Court of Appeals' adoption of federalized common law principles of choice of law and venue are permitted in this case, there is no logical reason why a similar "interstitial" federal common law requirement cannot be imposed in other cases where Congress has sought to preserve state tort law in the face of a concurrent federal regulatory program.

III.

RECONCILING MILWAUKEE I, MILWAUKEE II, THE CLEAN WATER ACT, AND ERIE

As described above, the problem faced by the Court of Appeals was reconciling the footnote law of *Milwaukee I* and *Milwaukee II* with the clear intent of the Congress to preserve state law and the constitutional mandates of *Erie* (the Tenth Amendment). This Court could reconcile footnote 6 of *Mil-*

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truck or rail under federal license to treatment, storage, and disposal sites in other states. Under the theory espoused by the Court of Appeals in its federalized law of the tortfeasor state approach (with common law venue only in the tortfeasor's state), a citizen damaged by contaminated groundwater in the state where the waste was disposed of could not sue the generator of that waste under the law of the victim's state, nor could the victim even sue the generator in the place of the injury. Similar arguments would be raised where the contamination of a groundwater aquifer moved from the disposal area in one state into the groundwater of another state. Moreover, many of the interstate generators and shippers of toxic materials are municipalities, and many municipalities are also owners and operators of disposal sites.

[17] For example, a large number of product liability cases involving failure of a component necessarily include out of state manufacturers or component assemblers.

waukee I with congressional preservation of state law by simply overruling any arguable application of *Milwaukee I* to a diversity case based on state tort law.[18]

Alternatively, this Court could construe the holding in *Milwaukee I* to have preempted state law only while federal common law was in existence. Once Congress preempted federal common law, the ban on state law was gone and Congress was free to arrange the federal state relationship as it saw fit. Congress' action in recognizing the role of state law in effect restored the temporarily suspended state law. See *Butner* v. *United States,* 440 U.S. 48 n.9 (1979).

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[18] If one listened to the hyperbole of the Hammond defendants, *Milwaukee I* prohibits application of the victim's state law against a state or a political subdivision on the theory that state militia will march if the victim's state law is applied against a sovereign state or its political subdivision. But the law is clear that even sovereign states may be subject to application of the victim's state law. See e.g., *Nevada* v. *Hall,* 440 U.S. 410 (1979); *Maroon* v. *State Dept. of Mental Health,* 411 N.E.2d 404 (Ind. App. 1980).

CONCLUSION

It is imperative that this Court declare that the state tort law preserved by the Congress is grounded in state not federal law and that in a diversity case founded on such state tort law the federal Courts are bound by the constitutional doctrine announced in *Erie* v. *Tompkins* and set forth in the Rules of Decision Act that they must follow the choice of law rules of the state in which the district court sits.

This Court should grant the petition for certiorari.

Respectfully submitted,

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